

**Proposal No. 1**

**PROPOSED AMENDMENTS TO RULES 110 AND 111 WOULD INCORPORATE THE COMMISSION'S PRACTICE OF INCLUDING SPECIFICITY OF ALLEGATIONS OF MISCONDUCT IN STAFF INQUIRY AND PRELIMINARY INVESTIGATION LETTERS.**

The proposed amendment would add the following subdivision to rule 110 [Staff Inquiry] and 111 [Preliminary Investigation]<sup>1</sup> (amended language is reflected in italics):

**Rule 110. Staff Inquiry; Advisory Letter after Staff Inquiry**

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*(b) (Staff Inquiry Letter) A staff inquiry letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the inquiry concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.*

**Rule 111. Preliminary Investigation**

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*(b) (Preliminary Investigation Letter) A preliminary investigation letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the investigation concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.*

**Explanation of Proposed Amendments to Rule 110 and Rule 111**

The commission currently informs the judge of the specifics of the allegation(s) in staff inquiry and preliminary investigation letters. To the extent possible, the judge is informed of the date and location of the conduct, the name(s) of the case or court proceeding in which the conduct occurred, and, where pertinent, the text or summary of comments allegedly made by or to the judge. This practice is currently stated in Policy Declarations 1.3 and 1.5. The policy underlying the practice is to afford the judge an opportunity to respond and provide information about the factual aspects of the allegations. The commission proposes amending rules 110 and 111, relating to staff inquiry and preliminary investigations, to include the practice currently adhered to by the commission, while leaving the policy underlying the practice unchanged in the Policy Declarations.

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<sup>1</sup> Current subdivisions (b) and (c) in rules 110 and rule 111 would be designated as subdivisions (c) and (d), respectively.

## **Proposal No. 2**

### **PROPOSED NEW RULE 111.4 WOULD SET FORTH THE LEGAL ERROR STANDARD FOR THE IMPOSITION OF DISCIPLINE AS STATED BY THE SUPREME COURT.**

The following new rule 111.4 is proposed (amended language is reflected in italics):

*Discipline, including an advisory letter, shall not be imposed for mere legal error without more. However, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation and discipline.*

### **Explanation of Proposed New Rule 111.4**

The California Judges Association has proposed that the commission adopt a rule setting limitations on issuance of advisory letters involving legal error. The standard adhered to by the commission in this regard is set by the California Supreme Court in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371. To ensure that the judiciary is fully informed of this standard, the commission proposes incorporating the standard in new rule 111.4, which would apply to all forms of discipline, not just the advisory letter.

**Proposal No. 3**

**PROPOSED AMENDMENTS TO RULES 114(b) AND 116(b) PROVIDE THAT WHEN THE INVESTIGATION OF NEW INFORMATION SUBMITTED DURING THE APPEARANCE PROCESS DISCLOSES POSSIBLE OTHER MISCONDUCT, THAT INFORMATION WILL NOT BE CONSIDERED IN THE DISPOSITION OF THE PENDING CASE, BUT MAY BE THE SUBJECT OF A NEW STAFF INQUIRY OR PRELIMINARY INVESTIGATION. THE PROPOSED AMENDMENTS ALSO PROVIDE AN ADDITIONAL GROUND FOR CONSIDERING NEW INFORMATION DURING THE APPEARANCE PROCESS.**

The following amendment is proposed (amended language is reflected in italics, deletion of original language is reflected in strike-through):

**Rule 114. Private Admonishment Procedure**

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**(b) (Appearance before the commission) The judge may, within 30 days of the mailing of a notice of intended private admonishment, file with the commission a written demand for an appearance before the commission to object to the intended private admonishment, and waive the right to formal proceedings under rule 118 and to review by the Supreme Court. A judge who demands an appearance before the commission shall, within 30 days of the mailing of the notice of intended private admonishment, submit a written statement of the basis of the judge's objections to the proposed admonishment.**

After the time set for the appearance before the commission, the commission may:

- (1) Close the matter without disciplinary action;**
- (2) Close the matter with a confidential advisory letter; or**
- (3) Issue a private admonishment.**

If the commission determines to issue discipline after an appearance under this rule, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.

An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, or (2) offered to correct an error of fact in

the notice of intended private admonishment, or (3) is necessary to prevent a miscarriage of justice.

*To be considered under this rule, new factual information must be presented at the time the judge submits written objections to the proposed admonishment. When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information before proceeding with its disposition pursuant to the appearance process. If this investigation discloses information of possible other misconduct, that information will not be considered in the disposition of the pending notice of intended private admonishment but may be the subject of a new staff inquiry or preliminary investigation. Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section or withdraw the intended admonishment and proceed with the preliminary investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.*

#### **Rule 116. Public Admonishment Procedure**

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**(b) (Appearance before the commission)** The judge may, within 30 days of the mailing of a notice of intended public admonishment, file with the commission a written demand for an appearance before the commission to object to the intended public admonishment, and waive the right to formal proceedings under rule 118 and to review by the Supreme Court. A judge who demands an appearance before the commission shall, within 30 days of the mailing of the notice of intended public admonishment, submit a written statement of the basis of the judge's objections to the proposed admonishment.

After the time set for the appearance before the commission, the commission may:

- (1) Close the matter without disciplinary action;
- (2) Close the matter with a confidential advisory letter;
- (3) Issue a private admonishment; or
- (4) Issue a public admonishment.

If the commission determines to issue discipline after an appearance under this rule, it may in its final decision modify the notice in response to the judge's written objections and any oral presentation.

An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, or (2) offered to correct an error of fact in the notice of intended public admonishment, or (3) is necessary to prevent a miscarriage of justice.

*To be considered under this rule, new factual information must be presented at the time the judge submits written objections to the proposed admonishment. When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information before proceeding with its disposition pursuant to the appearance process. If this investigation discloses information of possible other misconduct, that information will not be considered in the disposition of the pending notice of intended private admonishment but may be the subject of a new staff inquiry or preliminary investigation. Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section or withdraw the intended admonishment and proceed with the preliminary investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.*

#### **Explanation of Proposed Amendments to Rule 114(b) and Rule 116(b)**

These amendments are proposed in response to a proposal submitted by the California Judges Association (CJA) concerning the procedure in which a judge appears before the commission to object to a notice of intended private or public admonishment. (Rules 114(b), 116(b).) An appearance is not an evidentiary hearing. The judge is given the opportunity to present factual information and documents during the preliminary investigation. Upon receipt of a notice of intended admonishment, the judge may accept the admonishment, demand a formal evidentiary hearing, or waive the right to formal proceedings and make an appearance before the commission. After an appearance, the commission may close the matter or issue discipline up to the level proposed in the notice of intended admonishment; the level of discipline cannot be increased.

Under current rules 114(b) and 116(b), when a judge demands an appearance to object to a notice of intended private or public admonishment, the commission will only consider new factual information that is material and could not have been discovered with reasonable diligence during the preliminary investigation, or that is offered to correct an error of fact in the notice of intended admonishment. If the new information meets the criteria for consideration, current

rules provide that the commission may investigate the new information and thereafter either proceed with the appearance process or withdraw the intended admonishment and proceed with a preliminary investigation.

In most cases, consideration of new information submitted by a judge under these rules will not result in a higher level of discipline because the information will most likely be mitigating. However, the commission's investigation of the newly submitted information could, in some rare cases, disclose information of possible other misconduct. CJA proposes that the commission should be prohibited from withdrawing the notice of intended admonishment and proceeding with the preliminary investigation after its investigation of newly submitted evidence. In consideration of CJA's proposal, the commission determined that new information which discloses possible other misconduct should not be considered in the disposition of the pending notice of intended admonishment, but could be the subject of a new staff inquiry or preliminary investigation. Thus, under the proposed amendment, the commission could not increase the level of discipline in the pending matter, but could commence a new inquiry or investigation based on the new information. Under the commission's proposal, the commission retains authority to consider the new information if it mitigates the judge's conduct or the appropriate level of discipline.

The proposed amendment also adds a ground for the introduction of new factual information – when the commission determines that consideration of the information is necessary to prevent a miscarriage of justice. Although the commission is of the view that the appropriate time to submit information to the commission is during the preliminary investigation, this proposed amendment would allow the commission to consider information that does not meet the current criteria for consideration during the appearance process in those rare instances where failure to consider the information would result in a miscarriage of justice.

**Proposal No. 4**

**THE INTERIM AMENDMENT TO RULE 119.5 ALLOWS FOR ELECTRONIC AND FACSIMILE FILING AND SERVICE OF BRIEFS AND PAPERS DURING FORMAL PROCEEDINGS UNDER SPECIFIED CONDITIONS.**

In order to provide for electronic and facsimile filing and service of briefs and papers during formal proceedings under specified conditions, the commission voted to amend rule 119.5 on an interim basis as follows (amended language is reflected in italics, deletion of original language is reflected in strike-through):

**Rule 119.5. Filing with the Commission During Formal Proceedings**

*(a) (Procedures for filing) After the institution of formal proceedings, all briefs and other papers to be filed with the commission shall be delivered to ~~commission staff~~ to the commission office during regular business hours by hand delivery or by mail, or electronic or facsimile transmission as provided in this rule, and shall be accompanied by a proof of service of the document upon the other party or parties, and upon the special masters if they have been appointed in the matter. This includes documents submitted in conjunction with a hearing before the special masters, other than exhibits to be admitted at the hearing. Exhibits admitted at a hearing before the masters shall be transmitted to the commission office pursuant to rule 125.5. A document is filed with the commission when the original is stamped or otherwise marked "filed" with the date. The commission's agent for purposes of filing documents after institution of formal proceedings is the Legal Advisor to Commissioners or the Legal Advisor's designee. A filing may be evidenced by a conformed copy of the cover page of each document submitted for filing.*

*(b) (Facsimile filing) Facsimile filing means the transmission of a document by facsimile, directed to the Legal Advisor to Commissioners or the Legal Advisor's designee.*

*(c) (Electronic filing) Electronic filing means the transmission of a document by electronic service to the electronic address of the commission, directed to the Legal Advisor to Commissioners or the Legal Advisor's designee.*

*(d) (Conditions for facsimile and electronic filing) After the institution of formal proceedings, parties or non-parties pursuant to Rule 131 may file documents with the commission electronically or by facsimile, subject to the following conditions:*

*(1) Original paper documents, with any required signatures, shall be delivered to the commission office by mail or hand delivery within five calendar days of the facsimile or electronic filing, and shall be accompanied by proof of service.*

***(2) A document transmitted electronically or by facsimile shall be deemed filed on the date received, or the next business day if received on a non-business day or after 5:00 p.m., provided the original paper document is received pursuant to subsection (1) of this subdivision.***

***(3) The document shall be considered filed, for purposes of filing deadlines and the time to respond under these rules, at the time it is received electronically or by facsimile by the commission as set forth in subsection (2) of this subdivision.***

***(4) Upon receipt of a facsimile or electronically filed document, the commission shall promptly send the filer confirmation that the document was received.***

***(e) (Signatures) When the document to be filed requires the signature of any person, the document shall be deemed to have been signed by that person if filed electronically or by facsimile.***

***(f) (Electronic and facsimile service) After the institution of formal proceedings, documents may be served by electronic means or by facsimile on another party, a party's attorney, or the special masters when the party, attorney, or special master has agreed to accept electronic service and/or facsimile service.***

#### **Explanation of Interim Amendment to Rule 119.5**

Electronic filing of briefs and papers has become an increasingly common practice in courts. Code of Civil Procedure section 1010.6 permits trial courts to adopt local rules permitting electronic filing and service of documents, subject to certain conditions. The Court of Appeal, Second Appellate District, is partaking in a pilot e-filing program. (Cal. Rules of Court, rules 8.70-8.79.) For the convenience of the parties and the special masters, the commission voted on an interim basis to allow for facsimile and electronic filing of briefs and papers during formal proceeding subject to certain conditions, including that the original document be delivered to the commission office within five calendar days. The interim amendment also provides for electronic and facsimile service of briefs and documents during formal proceedings upon consent of the party, attorney or special master to be served.



**Proposal No. 5**

**THE AMENDMENT TO RULE 122(g)(2) CONCERNING DISCOVERY DEPOSITIONS  
ELIMINATES THE SUNSET CLAUSE THAT EXPIRED ON DECEMBER 31, 2012.**

At its December 2012 meeting, the following amendment to rule 122(g)(2), which allows for a limited number of discovery depositions during formal proceedings, was adopted (deletion of original language is reflected in strike-through):

**Rule 122. Discovery Procedures**

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**(g) (Depositions)**

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**(2) (Discovery depositions)** In addition to depositions to perpetuate testimony provided for under subpart (1) of this subdivision, discovery depositions are permitted as provided in this subpart (2). Discovery depositions may not be videotaped.

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~~The provisions of subpart (2) of subsection (g) of rule 122 shall take effect January 1, 2008, and shall be operative until December 31, 2012, unless after review, they are reenacted by the commission.~~

**Explanation of Amendment to Rule 122(g)(2)**

In 2008, the commission adopted amendments to rule 122(g), expanding depositions permitted as discovery during formal proceedings. The amendment contained a sunset clause which provided that the provisions of subdivision (g), subsection (2) of rule 122 shall be operative until December 31, 2010, unless after review, it is reenacted by the commission. In 2010, the commission extended the sunset clause until December 31, 2012. At its December 2012 meeting, the commission voted to reenact rule 122(g) without a sunset clause.

The purpose of the sunset clause was to give the commission the opportunity to assess the impact of depositions on the formal proceeding process. Four depositions have been conducted since the deposition rule went into effect on January 1, 2008. There have been no reported problems or issues during the four years the rule has been in effect.